

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEELANAU WINE CELLARS, LTD.,

Plaintiff,

v.

Case No. 1:01-CV-319

BLACK & RED, INC., et al.,

HON. GORDON J. QUIST

Defendants.

OPINION

Background

On August 13, 2002, this Court issued an Opinion and Order granting partial summary judgment to Plaintiff, Leelanau Wine Cellars, Ltd. ("LWC"), on Counts I and II of the first amended complaint for trademark infringement and unfair competition under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). The Order also enjoined Defendants, Black & Red, Inc. ("B & R"), Joanne Smart ("Smart"), and Roberta Kurtz ("Kurtz") from using the term "Leelanau" in any trade name and/or brand name for the sale of wine, although Defendants were permitted to use the term "Leelanau Peninsula" as an appellation of origin as permitted by applicable laws and regulations. On August 28 and 29, 2002, the Court heard testimony in a bench trial regarding the issue of whether Defendants' infringement of LWC's mark was willful. At the conclusion of the bench trial, the Court advised the parties that it would issue a written decision on the issue of willfulness. On October 11, 2002, the Court sent a letter to counsel indicating that it had reservations about its August 13, 2002, Order based upon further review of the facts and the law. On November 21, 2002, the Court issued

an Order identifying the reasons why its prior Opinion and Order may have been erroneous. In addition, the Order provided LWC with an opportunity to: (1) respond to the Court's concerns; (2) identify any additional evidence not presented in the summary judgment motion upon which LWC would rely if a trial were held; (3) address whether additional trial is necessary. LWC has filed its response to the Court's November 21, 2002, Order, and Defendants have filed a reply.

For the reasons set forth below, the Court concludes that it may properly enter judgment pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. LWC has had an adequate opportunity to present its evidence through a summary judgment motion, in which it argued, and the Court found, that there was no genuine issue of material fact regarding the issue of likelihood of confusion. In addition, as noted above, the Court held a two-day bench trial in which LWC had the opportunity to present testimony and documentary evidence. While the issue at trial was whether Defendants acted willfully, some of the evidence introduced at trial was germane to the issue of likelihood of confusion and prompted the Court to reexamine its previous grant of partial summary judgment. Finally, as noted above, pursuant to the Court's November 21, 2002, Order, LWC was also given the opportunity to identify any evidence not submitted to the Court in LWC's motion for summary judgment or at trial, which it would present if a trial were held on the issue of likelihood of confusion.

In response to the November 21, 2002, Order, LWC contends that there are genuine issues of material fact regarding the following issues: (1) the marketing channels used by the parties; (2) the likelihood of Defendants' expansion of their marketing activities; and (3) Defendants' intent in adopting the infringing mark. With regard to the last issue, LWC asserts that Defendants' intent is an open issue because Defendants falsely testified at trial that after receiving LWC's letter demanding

that Defendants cease using their name, Defendants spoke with an attorney in Washington, D.C., who advised them that LWC had no lawful right to use the term "Leelanau" as part of its trademark. LWC states that following trial, it deposed the alleged attorney, David Romine ("Romine"), who testified that he is not an attorney, is not familiar with trademark law, and did not advise Defendants as to whether LWC could lawfully trademark a geographically descriptive name. (Romine Dep. at 8, 24-31, Pl.'s Resp. Ct's 11/21/02 Order Ex. H.)

Romine's testimony, even if accepted as true, is irrelevant to Defendants' intent in selecting their mark because Defendants did not speak with Romine until several months after Defendants first began using their mark. Moreover, as noted below, Defendants were using a name that included "Leelanau" several years prior to the time they began producing and selling wine. Therefore, Romine's testimony does not create an issue for trial. LWC's argument regarding the marketing channels used by the parties and Defendants' expansion of their marketing activities is based upon Defendants' admission that they have hired a full-time sales person to sell their product outside the tasting room. (Smart Dep. at 3-5, Pl.'s Resp. Ct.'s 11/21/02 Order Ex. F.) As explained below, however, even if further evidence shows that Defendants are expanding their sales to compete more directly with LWC's product, the Court concludes that such evidence, alone or in conjunction with other evidence, would be insufficient to establish a likelihood confusion in light of the lack of strength of LWC's mark and the lack of similarity between the marks. Therefore, the Court finds that all relevant and material evidence has been presented and that further trial is unnecessary. Accordingly, this Opinion shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a).

Discussion

I. Court's Authority to Reconsider Its Prior Order

LWC first asserts that this Court is without authority to reconsider its prior Order on its own initiative because the Court is bound by the ten-day time limit set forth in Rule 59 of the Federal Rules of Civil Procedure. LWC argues that the ten-day period would have applied if Defendants had filed a motion for reconsideration because Defendants could have immediately appealed the Court's August 13, 2002, Order pursuant to 28 U.S.C. § 1292(a)(1), thus making the Order a true "judgment" within the meaning of Federal Rule of Civil Procedure 54(a). Therefore, LWC argues, this Court is likewise bound by the ten-day period set forth in Rule 59(d). That rule provides, in part, "No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion." Fed. R. Civ. P. 59(d). Applying this time limit in accordance with the provisions of Rule 6, LWC asserts that this Court could not modify its Order after August 28, 2002, whether on motion by Defendant or on the Court's own initiative. The Court disagrees.

The correct starting point in the analysis is the well-recognized principle that district courts possess the discretion to reconsider their interlocutory orders at any time. See Holman v. Indiana, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998) (citing Cameo Convalescent Ctr., Inc. v. Percy, 800 F.2d 108, 110 (7th Cir. 1986)). In discussing this rule, the Sixth Circuit has observed, "District courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment. A district court may modify, or even rescind, such interlocutory orders." Mallory v. Eyrich, 922 F.2d 1273, 1282 (6th Cir. 1991) (internal citations omitted); see also United States v. Jerry, 487 F.2d 600, 605 (3d Cir. 1973) (noting that a district court has inherent power to reconsider

interlocutory orders "when it is consonant with justice to do so"); Lewis v. Grinker, 660 F. Supp. 169, 170 n.1 (E.D.N.Y. 1987) ("Since no final judgment has been entered in this case, the decision whether or not to reconsider a non-final order is within the plenary power of this Court."). Another court has noted:

The general rule regarding the power of a district court to rescind an interlocutory order is as follows: "As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, *rescind*, or modify an interlocutory order for cause seen by it to be sufficient."

City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 885 (9th Cir. 2001) (quoting Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981)). A court's authority to reconsider orders is also reflected in Rule 54(b), which states:

When more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order . . . which adjudicates fewer than all claims . . . shall not terminate the action . . . and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b). In this case, the Court's Order granting partial summary judgment was interlocutory in nature and, therefore, subject to revision at any time by the Court prior to entry of final judgment. Gallant v. Telebrands Corp., 35 F. Supp. 2d 378, 393 (D.N.J. 1998); United States v. Arkwright, Inc., 697 F. Supp. 1229, 1230 n.1 (D.N.H. 1988); Denson v. Northeast Ill. Reg'l Commuter R.R. Corp., No. 00 C 2984, 2002 WL 745797, at *1 (N.D. Ill. Apr. 2, 2002).

LWC suggests that the Court's inherent authority to modify the Order granting partial summary judgment is constrained by the fact that the August 13 Order, which granted a permanent injunction, was immediately appealable pursuant to 28 U.S.C. § 1292(a)(1). Under that provision,

courts of appeals are granted jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). LWC contends that because the Court's Order was appealable, the Rule 59 time limit applies to any reconsideration of the Order, whether by motion or upon the Court's own initiative. LWC is correct that when an order is immediately appealable pursuant to 28 U.S.C. § 1292(a)(1), the time for motions for reconsideration and/or to alter or amend is governed by Rule 59(e). See Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397, 400-01 (2d Cir. 2000) (noting that an appeal pursuant to 28 U.S.C. § 1292(a)(1) must be taken within thirty days after the date of entry of the injunction unless a timely Rule 59(e) motion has been filed); Fin. Servs. Corp. of the Midwest v. Weindruch, 764 F.2d 197, 198 (7th Cir. 1985) (noting if the defendants sought to move for reconsideration of an order appealable under 28 U.S.C. § 1292(a)(1), they were required to do so within 10 days as required by Rule 59(e)). The availability of a limited interlocutory appeal, however, in no way changes the interlocutory nature of the Order. An appeal pursuant to § 1292(a)(1) was simply one of several options available to Defendants if they sought review of the Order. Defendants' remaining options were to file a motion for reconsideration within the ten-day period under Rule 59(e) or wait and appeal the Order at the conclusion of the case after entry of a final judgment or order disposing of all the issues. See Favia v. Ind. Univ. of Pa., 7 F.3d 332, 337-38 (3d Cir. 1993) ("When a district court enters an order granting preliminary injunctive relief, parties who take exception to its terms must either file a motion for reconsideration in the district court within ten days under Rule 59(e), bring an interlocutory appeal from that order under 28 U.S.C. § 1292(a)(1), or wait until the preliminary injunction becomes final and then appeal."). Of course, if Defendants had appealed the Order within thirty days, the Court would have

lost jurisdiction over the matters addressed in the Order and, therefore, could not reconsider the Order. However, Defendants did not appeal the Order, and it retains its interlocutory character, subject to appeal once a final order or judgment has been entered. In Chambers v. Ohio Department of Human Services, 145 F.3d 793 (6th Cir. 1998), the Sixth Circuit observed that a party *may* appeal an order pursuant to § 1292(a)(1) but is not required to do so. Id. at 796. "[R]ather, a party may forgo an interlocutory appeal and present the issue to this court after final judgment." Id. "Thus, absent an interlocutory appeal or Rule 54(b) certificate, [a] permanent injunction issued by [a] district court remain[s] part of the case pending before the court until it issue[s] its final judgment disposing of all claims." Prudential Sec., Inc. v. Yingling, 226 F.3d 668, 671 (6th Cir. 2000). Because the Order remains interlocutory, Rule 59 does not affect this Court's inherent power to reconsider the Order.¹

LWC also cites cases addressing the applicable standards on a motion for reconsideration, contending that reconsideration is inappropriate unless there was a "palpable defect" in the prior proceedings or a "manifest error of law." (Pl.'s Resp. Ct.'s 11/21/02 Order at 15-16.) These standards are inapplicable, however, because the Court is not considering a motion for reconsideration, but instead the Court is exercising its inherent power to reconsider its orders. As indicated in the cases cited above, a court may reconsider its order "when it is consonant with justice to do so," Jerry, 487 F.2d at 605, or "'for cause seen by it to be sufficient,'" City of Los Angeles, 254 F.3d at 885. The Court concludes that reconsideration is appropriate in these circumstances because if the Court's partial summary judgment and injunction were erroneous, the immediate adverse

¹None of the cases cited by LWC address a court's inherent power to reconsider its orders. Rather, the cases all pertain to motions for reconsideration.

consequences to Defendants are enormous, and this Court is the best place to correct its own error in the first instance.

II. Reconsideration

After fully assessing the evidence received during trial and further evaluating the applicable law, the Court concludes that its prior determination that LWC met its burden of demonstrating likelihood of confusion was incorrect both as a matter of fact and of law. As explained in further detail below, the Court reaches this conclusion because its analysis of the eight-factor test adopted by the Sixth Circuit, see Frisch's Rests., Inc. v. Shoney's, Inc., 759 F.2d 1261, 1264 (6th Cir. 1985) (citing Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 620 F.2d 642, 648 (6th Cir. 1982)), did not take into account: (1) the "Leelanau Peninsula" appellation of origin, which became recognized only a few years after LWC began using Leelanau in its name; (2) the absence of any evidence showing any degree of recognition in the marketplace of LWC's mark, or, stated differently, the absence of evidence showing that consumers understand the term "Leelanau," when used in connection with wine, to refer to LWC; (3) a comparison of the parties' actual labels presented at trial, which, when considered as part of a proper application of the similarity factor, demonstrates that the marks are not similar; (4) testimony presented at trial that B & R's primary channel for marketing is through its tasting room in Suttons Bay, Michigan, while LWC's products are more widely distributed through retail and discount stores, e.g., Sam's Club; and (5) testimony at trial showing that Defendants chose the name "Chateau de Leelanau" to indicate the geographic origin of their product—the "Leelanau Peninsula,"—rather than to capitalize upon any name recognition LWC might have realized in the term "Leelanau."

A. Prior Rulings

In its prior Opinion and Order, this Court made several rulings regarding issues raised by both parties. First, the Court rejected Defendants' argument that "Leelanau" is primarily geographically descriptive and therefore is not eligible for registration, noting that this argument ignored the plain language of 15 U.S.C. § 1052(f). See generally, J. McCarthy, McCarthy on Trademarks and Unfair Competition § 14.26 (4th ed. 1996) (hereafter "McCarthy"). Second, distinguishing Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc., 871 F.2d 590 (6th Cir. 1989), the Court held that Defendants failed to present any evidence to rebut the presumption of secondary meaning arising under § 1052(f) for purposes of showing that the registration was invalid. Third, the Court rejected Defendants' argument that the term "Leelanau" is not eligible for trademark protection, because the Leelanau Peninsula has been a recognized viticultural area since 1981.² See generally, McCarthy § 14.19.1. Finally, the Court held that Defendants' evidence failed to create a genuine issue of material fact and that application of the Sixth Circuit's eight-factor test, based upon the evidence in the record, demonstrated a likelihood of confusion between the two marks.

For the reasons set forth in the prior Opinion, the Court adheres to its rulings on the first three issues. For the reasons set forth below, the Court will vacate only its prior ruling on likelihood of confusion.

B. Likelihood of Confusion

As set forth in the previous Opinion, the factors relevant to determining the issue of market confusion are: (1) strength of the plaintiff's mark; (2) relatedness of the goods or services; (3)

²Defendants' brief in response to LWC's motion for summary judgment was devoted almost exclusively to attacking the validity of LWC's registration and did not specifically address the eight-factor analysis for likelihood of confusion.

similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care and sophistication; (7) the defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines using the marks. Frisch's Rests., Inc., 759 F.2d at 1264.

Each case presents its own complex set of circumstances and not all of these factors may be particularly helpful in any given case. But a thorough and analytical treatment must nevertheless be attempted. *The ultimate question remains whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.*

Kellogg Co. v. Exxon Corp., 209 F.3d 562, 568 (6th Cir. 2000) (emphasis added).

1. Strength of the Plaintiff's Mark

In its prior analysis, the Court declined to give any weight to LWC's non-consumer evidence of market recognition but concluded that LWC's use of the term "Leelanau Cellars" in its sales of wine for approximately twenty-five years was sufficient to establish some degree of market recognition without resort to consumer evidence. Upon reconsideration, the Court concludes that because LWC's mark is inherently weak, LWC's length of use of the term "Leelanau," without some other evidence of market recognition, such as evidence showing that consumers have come to associate the term "Leelanau" with LWC's products, as opposed to simply wine from the Leelanau area, is insufficient to support the conclusion that LWC's mark possesses any degree of strength.

A mark's "strength" is gauged by its "distinctiveness and degree of recognition in the marketplace." Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1107 (6th Cir. 1991). Leelanau is a geographically descriptive mark which, without a showing of acquired secondary meaning, is inherently weak. In Boston Beer Co. Limited Partnership v. Slesar Brothers Brewing Co., 9 F.3d 175 (1st Cir. 1993), the plaintiff, the brewer of SAMUEL ADAMS beer, sought to enjoin the defendant from using the words "Boston Beer" in its name and from using the word

"Boston" in connection with any of its beers. Id. at 179-80. Although neither term was registered, as in this case, the court noted that the general principles for determining whether a mark qualifies for protection under Section 2 of the Lanham Act are also applicable in determining whether an unregistered mark is entitled to protection under Section 43(a) of the Lanham Act. Id. Because the marks were descriptive, the court held that they were entitled to protection only upon a showing of secondary meaning. The court observed:

To establish secondary meaning in the mark "Boston," not only must appellant prove that, when read or heard by consumers in connection with beer, "Boston" no longer means that the beer was brewed in Boston or by a Boston-based brewer, but that the consuming public recognizes that the word "Boston" identifies appellant as the source of the beer.

Similarly, with respect to the mark "Boston Beer," as used in appellant's name, The Boston Beer Company, appellant must prove that a substantial portion of the consuming public associates those words specifically with appellant's business.

Id. at 181-82 (citations omitted). Although the plaintiff presented consumer survey evidence as direct evidence of secondary meaning, the district court discounted the survey for a variety of reasons and concluded that the plaintiff's evidence failed to establish that the consuming public had come to associate the plaintiff as the source of "Boston Beer." Id. at 182. The court of appeals held that the district court's conclusion that secondary meaning was not established by either the survey evidence or circumstantial evidence was supported by the record. Id. at 182-83.

While the inquiry in Boston Beer, secondary meaning, is a distinct legal inquiry from the inquiry here – strength of LWC's mark – Boston Beer still provides guidance on the type of evidence required to establish the strength of a geographically descriptive mark because "[t]he common denominator is the nature of the evidence used to support both legal concepts." Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc., 270 F.3d 298, 316-17 n.8 (6th Cir. 2001) (quoting McCarthy

§ 11.82). Thus, a geographically descriptive mark's strength may be established through the presentation of direct evidence, such as consumer surveys; indirect evidence, such as the length and manner of use of the mark, the extent of advertising and promotion of the mark, and efforts made to promote a conscious connection in the public's mind between the mark and the plaintiff's product; or both. Boston Beer, 9 F.3d at 182.

The record in this case is completely devoid of any consumer survey or other direct evidence showing that consumers understand "Leelanau," when used in connection with wine, to refer to LWC. As noted in the prior Opinion, LWC did submit an affidavit of William Schwab, the manager of the wine department of Papa Joe's Gourmet Foods & Marketplace, who states that he understands customer inquiries about "Leelanau wines" or "wines from Leelanau" to refer to products from LWC. (Schwab Aff., Pl.'s Br. Supp. Ex. 5.) Aside from the fact that Schwab's statement is inadmissible, Schwab's perception of what a customer means when he or she refers to "wines from Leelanau" is insufficient to demonstrate any degree of consumer recognition.

The only other evidence pertaining to the strength of LWC's mark is the length of use – approximately twenty-five years – and a statement from Michael H. Jacobson, the president and sole shareholder of LWC, that "[s]ince 1977, LWC has sold and marketed its wine under the name 'Leelanau Cellars' and has spent millions of dollars in operation of its winery designed to promote its brand name." (Jacobson Aff. ¶4, Pl.'s Br. Supp. Ex. 2.) Jacobson's statement that LWC has spent millions of dollars on the *operation* of its winery proves nothing about LWC's efforts to advertise and/or promote its mark because nothing in the record indicates that LWC's advertising expenses exceed the level "required to 'merely survive' in the competitive market." Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc., 871 F.2d 590, 596 (6th Cir. 1989).

LWC's burden in this case is even more onerous than the plaintiff's burden in Boston Beer because here, the term Leelanau is not only a geographical description, but, for over twenty years, has been part of an approved appellation of origin for wine. LWC asserts that the establishment of an American viticultural area ("AVA"), such as the "Leelanau Peninsula," cannot have any legally significant impact upon a trademark owner's rights. In support of its argument, LWC cites Sociedad Anonima Vina Santa Rita v. United States Department of the Treasury, 193 F. Supp. 2d 6 (D.D.C. 2001, a case this Court cited in its initial Opinion in rejecting Defendants' argument that the designation of the Leelanau Peninsula as an AVA precluded LWC from enforcing its rights in a trademark using the term "Leelanau" for the sale of wine. In that case, the plaintiff, a Chilean winery which sold wine under the name "Santa Rita," sought to challenge a final rule by the Bureau of Alcohol, Tobacco and Firearms ("BATF") recognizing an area in Santa Barbara County, California known as "Santa Rita Hills" as an AVA. Id. at 8. The plaintiff argued, among other things, that the rule infringed upon the plaintiff's trademark in the name "Santa Rita" and diluted the value of that trademark. The court rejected the argument because the BATF had not used or copied the name "Santa Rita" or adopted the name as a competing mark, and because any trademark action would require a detailed analysis of the allegedly infringing label. Id. at 20. In addition, the court noted that AVA recognition and trademark protection serve two distinct purposes, the former being to identify the geographic origin of a particular wine, and the latter being to identify the particular manufacturer or producer of the good. Id. at 21-22. LWC asserts that the court's decision in Santa Rita means that the existence of an AVA can never be a relevant consideration in a trademark infringement case. The Court disagrees for two reasons. First, Santa Rita did not involve a trademark case in which the court was required to consider the factors in the likelihood of confusion

analysis. Second, this Court does not read the Santa Rita decision as holding that the existence of an AVA can never be relevant in a likelihood of confusion analysis, especially in relation to the strength of the mark. In a strength of the mark analysis, third-party use of the mark is a factor that may weaken the mark. Data Concepts, Inc. v. Digital Consulting, Inc., 150 F.3d 620, 625 (6th Cir. 1998). An analogous situation is presented where the plaintiff's mark and a similar AVA have coexisted for many years. In that situation, it is reasonable to conclude that the AVA would tend to weaken the plaintiff's mark because consumers of wine would likely be as familiar, if not more so, with the AVA than they would be with any third-party's use of the mark.

In this case, Leelanau connotes not only an area where a winemaker may be located, as did "Boston" in the Boston Beer case, but also a particular geographic area from which a wine originates. LWC has not presented any evidence tending to show that a consumer would understand "Leelanau wine" as being a reference to LWC, rather than to a wine from the "Leelanau Peninsula" viticultural area. In the absence of any significant consumer evidence to the contrary, it is at least as likely that a consumer would understand a reference to wine as a "Leelanau wine" to mean that the wine originated from the Leelanau Peninsula, just as a consumer would understand a reference to wine as a "Napa wine" to mean that the wine originated from the Napa Valley.

Because LWC has failed to present any evidence showing that consumers understand "Leelanau" when used in connection with wine to refer to LWC and not simply a wine from the Leelanau Peninsula, the Court concludes that LWC's mark is weak.

2. Relatedness of the Goods

In its previous Opinion the Court concluded that the parties compete directly because LWC and Defendants both sell the same product to the same consumers in the same geographical area.

The Court has not received any evidence tending to undermine this conclusion and therefore adheres to this ruling. Thus, "confusion [will be] likely if the marks are sufficiently similar." Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr., 109 F.3d 275, 282 (6th Cir. 1997).

3. Similarity of the Marks

In the prior Opinion, the Court concluded that the marks were similar because they both used the term "Leelanau." The Court now concludes that its prior analysis was incomplete, because it focused only upon the word "Leelanau" common to both marks rather than upon the totality of the marks. See Little Caesar Enters., Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 571 (6th Cir. 1987) (noting that emphasis on the "prominent" feature of a mark rather than on its totality violates the rule against comparing dissected components of a mark). A court should not conduct a side-by-side comparison, but instead "must determine, in the light of what occurs in the marketplace, whether the mark 'will be confusing to the public when singly presented.'" Wynn Oil co. v. Thomas, 839 F.2d 1183, 1187 (6th Cir. 1988) (quoting Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 941 (10th Cir. 1983)). In determining similarity, a court should examine the pronunciation, appearance, and verbal translation of the marks. Id. at 1188 (citing McCarthy, § 23:4 (2d ed. 1984)).

With regard to pronunciation, the Court concludes that there is little similarity between the marks. While both parties use the term "Leelanau," which is obviously spelled and pronounced the same way, it is more appropriate to focus on the entire name of both parties because the term "Leelanau" is geographically descriptive and is commonly used by many types of businesses in the Leelanau Peninsula to indicate their geographical tie to that area, (Defs.' Br. Opp'n Pl.'s Mot. Partial

Summ. J. Ex. G).³ See Little Caesar Enters., Inc., 834 F.2d at 571-72. The differences in pronunciation and appearance between "Leelanau Cellars" and "Chateau de Leelanau" are obvious. Unlike LWC's name, Defendant's name includes a French noun and preposition and contains one more syllable. In addition, when spoken, the names sound different, and the emphasis in LWC's name is upon "Leelanau," whereas the emphasis in Defendants' name is upon "Chateau." Apart from pronunciation and verbal translation, there are visual differences, both in the words that make up the names and the names as they appear on the parties' respective labels. At trial, the Court had the opportunity to view the parties' labels on actual bottles of wine for similarities and differences. The labels are very different in appearance. Defendants' label was clear, while LWC's label was opaque. It should be noted that Defendant's bottle was very similar to LWC's bottle; both were blue with a white cap. However, there was evidence that other wineries also use bottles which closely resemble LWC's bottle, and there is no evidence in the record that LWC or Defendants use only blue bottles with white caps.

Based upon the above analysis, the Court concludes that Defendants' mark is not similar to LWC's mark and that a consumer would not find Defendants' mark confusing when singly presented.

³Although LWC asserts that the "Leelanau Peninsula" AVA bears no logical relationship to the similarity of the marks, the Court believes that the existence of the AVA cannot be ignored in considering whether the marks are similar. As noted above, in assessing this factor, a court must determine whether the mark will be confusingly similar "in light of what occurs in the marketplace." Wynn, 839 F.2d at 1187. Because the "Leelanau Peninsula" is a recognized viticultural area, which is promoted as such by the vintners located in the Leelanau Peninsula (for example, through the Leelanau Peninsula Vintners Wine Trail publication), it is reasonable to infer that a purchaser of wine would be familiar with the AVA and would expect more than one brand of wine with "Leelanau" in its name.

4. Evidence of Actual Confusion

As noted in the previous Opinion, there is no evidence of actual consumer confusion. The lack of such evidence, however, does not necessarily cut against a likelihood of confusion. Daddy's Junky Music Stores, 109 F.3d at 284.

5. Marketing Channels Used

The Court found in its prior Opinion that there was significant overlap between the marketing channels used by the parties. The evidence before the Court indicated that LWC and B & R both advertised in regional newspapers and magazines and regional wine industry publications. Although the evidence indicated that LWC spends more on advertising, neither party engages in any significant amount of advertising. As noted above, however, the evidence presented at trial demonstrated that the parties have marketed their wines through substantially different means. LWC has marketed its wines on more of a mass-basis through retail stores, while B & R's primary means of marketing has been its tasting room. Defendant Kurtz testified that the vast majority of B & R's sales are through its tasting room, while LWC's wines are distributed on a large-scale basis through local supermarkets and other stores, such as Sam's Club and Meijer. (8/28/02 Trial Tr. at 84.)

LWC correctly notes that Defendants have hired a full-time sales person to expand their sales outside of their tasting room. The Court agrees with LWC that, to the extent Defendants are attempting to increase their marketing and sales effort beyond their tasting room, this factor becomes a more significant factor in the analysis. However, LWC has not presented any evidence of the extent, if any, to which the parties' products are now being marketed side-by-side as a result of the salesperson's efforts.

6. Likely Degree of Purchaser Care

The Court previously found that there would be a low degree of purchaser care given the similarity of products and the relatively low price. However, because most consumers currently purchase B & R's wine from B & R's tasting room, rather than from a shelf at a grocery store, as is the case with LWC's wine, this factor does not carry significant weight in the Court's analysis.

7. Intent of Defendant

The Court previously concluded that the evidence presented by LWC suggested that Defendants selected a name including the term "Leelanau" with the intent of capitalizing on LWC's name recognition. In particular, the Court noted that the evidence showed that both of B & R's principals were aware of LWC's long-term use of its mark and that LWC's brand name was well-established in the market.

Upon closer examination of the evidence, and especially in light of the testimony received at trial, this Court is convinced that Defendants' intent in selecting their mark was not to cause confusion, but rather to indicate to purchasers both the geographical location of their business and the geographical origin of their product. Defendant Smart testified that B & R was engaged in the business of fruit growing for several years and sold grapes to Leelanau-area wineries. In approximately 1995, Defendants began doing business under the name "Le Coeur de Leelanau," which means in translation, "the heart of Leelanau." According to Defendant Smart, Defendants chose the name as a play on words based upon the location of their business within the Leelanau Peninsula as well as the fact that Defendant Kurtz is a cardiologist:

It (the business location) was primarily where we are located on the Leelanau Peninsula, in the shape of it. And our vineyard is in Leelanau Township. And because Roberta [Kurtz] is a cardiologist, it was kind of a play on that. And my

daughter Jill had actually suggested that name. She took French for a long time, and said, "That means 'the heart of Leelanau.'" And that was the exact, if you were like—on the clock, you say it's positioned at one o'clock. Well, we were positioned where maybe the heart of Leelanau would be, right in the center—upper center.

(8/28/02 Trial Tr. at 48.) When Defendants began to produce wine for sale in 1999 or 2000, they decided to change the name from "Le Coeur de Leelanau" to "Chateau de Leelanau" because they found that people were mispronouncing "Le Coeur" as "liquor," "leaker," or "looker" and decided it was not a good marketing name. (*Id.* at 49.) Defendants testified that LWC's name played no part in their choice of the name "Chateau de Leelanau." (*Id.* at 49, 82.) The Court credits this testimony and concludes that even though Defendants were aware of LWC's name at the time Defendants adopted their mark, they did not intend to cause confusion with LWC's mark when they chose a name including the term "Leelanau." Accordingly, this factor does not support a conclusion of likelihood of confusion.

8. Expansion of Product Line

The Court did not discuss this factor in its prior Opinion as LWC indicated that it was not relevant to the analysis. LWC now asserts that this factor is relevant and supports a finding of likelihood of confusion, because Defendants have confirmed that they have hired a full-time salesperson and are attempting to expand their product line within the same geographic market as LWC. "[A] 'strong possibility' that either party will expand his business to compete with the other or be marketed to the same consumers will weigh in favor of finding that the present use is infringing." Homeowners Group, Inc., 931 F.2d at 1112 (quoting Restatement of Torts § 731(b) & comment c (1938)).

9. Evaluation of the Factors

In evaluating the factors discussed above, the Court concludes that the following factors are relevant to the analysis: strength of the mark; relatedness of the goods; similarity of the marks; marketing channels used; likely degree of purchaser care; and expansion of the product line. Actual confusion and Defendants' intent in selecting the mark are not relevant to the likelihood of confusion analysis in this case because there is no evidence of actual confusion and the Court has determined that Defendants did not select their mark with the intent of capitalizing on LWC's name recognition. With regard to the relevant factors, the Court concludes that strength of LWC's mark and similarity of the marks weigh heavily in favor of a conclusion of no likelihood of confusion. As noted above, LWC has failed to demonstrate that its mark has attained any degree of market strength and the marks are not similar. The lack of similarity carries significant weight in the analysis. While the relatedness of the goods, likely degree of purchaser care, expansion of product line, and (to a minimal extent) marketing channels factors do carry some weight towards a conclusion of likelihood of confusion, they do not outweigh the other factors, which establish that Defendants' name is not confusingly similar. In addition, although LWC asserts that it is irrelevant to a likelihood of confusion analysis, the Court concludes that the "Leelanau Peninsula" AVA is relevant to a determination of whether consumers of wine would believe that two brands of wine containing the name "Leelanau" are affiliated in some way. Although Court does not assign substantial weight to this consideration, it further demonstrates that confusion would not result simply because two brands of wine from the Leelanau Peninsula contain the name Leelanau. In sum, the relevant factors do not show that consumers will tend to believe that Defendants' wine is affiliated in some way with LWC's wine.

Conclusion

For the foregoing reasons, the Court will withdraw its August 13, 2002, Order granting partial summary judgment to LWC, dissolve the injunction against Defendants, and enter judgment for Defendants. In addition, because likelihood of confusion is central to LWC's unfair competition claim, Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623, 629 (6th Cir. 2002), as well as to LWC's Michigan Consumer Protection Act claim, the Court will enter judgment for Defendants on Counts III and IV of LWC's amended complaint. Finally, the Court will enter judgment for Defendants on LWC's claim in Count V for an accounting, which is dependent upon all other claims.

An Order and Judgment consistent with this Opinion will be entered.

Dated: February 14, 2003

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEELANAU WINE CELLARS, LTD.,

Plaintiff,

v.

Case No. 1:01-CV-319

BLACK & RED, INC., et al.,

HON. GORDON J. QUIST

Defendants.

ORDER AND JUDGMENT

In accordance with the Opinion filed this date,

IT IS HEREBY ORDERED that the Court's Order entered August 13, 2002, is
VACATED.

IT IS FURTHER ORDERED that the injunction precluding Defendants from using the
term "Leelanau" in their trade name "Chateau de Leelanau" is **DISSOLVED.**

IT IS FURTHER ORDERED that judgment is entered in favor of Defendants on all claims.

This case is **closed.**

Dated: February 14, 2003

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE